Supreme Court, U.S.
FILED
JUL 27 2000
CLERK

(29)

No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF
NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE CENTER FOR THE ORIGINAL INTENT OF THE CONSTITUTION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Army Corps of Engineers refused to grant the petitioner, a consortium of 23 municipalities, permission to turn an abandoned strip mine into a landfill. The Corps claimed jurisdiction over the site solely because migratory birds had been observed on the property.

Question presented: May the Corps, consistent with the Clean Water Act and the Commerce Clause of the U.S. Constitution, assert jurisdiction over isolated intrastate waters solely because those waters do or potentially could serve as habitat of migratory birds?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and those inalienable rights that were conferred by the Creator and which are acknowledged in the Declaration of Independence. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our briefs to date, we have argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, limit the powers of Congress over States. In our briefs in *United States v. Morrison*, 68 U.S.L.W. 4351 (2000) and *Jones v. United States*, 68 U.S.L.W. 4422 (2000), we explained how the Founders' notion of "separate incompetence" limits the power of Congress over private intrastate activity. In this brief, we bring together the complementary strands of "dual sovereignty" and "separate incompetence" in an effort to return to the *strong* yet *limited* federal government our Founders established.

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae* or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

The vertical separation of powers between the State and federal governments is one of the structural guarantees of liberty within our Constitution. Another equally important safeguard of our freedom is the horizontal separation of powers between the coordinate branches of the federal government. That horizontal separation is threatened whenever one branch of government arrogates to itself the powers that our Founders placed exclusively in other hands.

Our Founders established a federal government with enumerated, and separated powers. The limits on federal power were originally intended to protect the autonomy of the States and the liberties of the people. The Founders viewed vigorous State governments and limited federal government as essential to personal liberty. So do we.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people. If unelected elites can change the meaning of the Constitution, then we cease to be self-governing citizens and become, instead, the subjects of someone else's governance.

SUMMARY OF ARGUMENT

This case turns on the meaning of two constitutional phrases and one statutory term. The terms are:

- What is "commerce ... among the several States," as it appears in the United States Constitution in Article I, section 8, clause 3?

- What is "the executive power of the United States," as it appears in the first sentence of Article II, section 1?

- What are "the navigable waters" of the United States, as that term appears in the Clean Water Act, 33 U.S.C. § 1344?

If *any* of these terms are used in their ordinary sense, the judgment of the Seventh Circuit must be reversed. If all of these terms are twisted out of recognition to uphold federal power over private property, then perhaps our national experiment with limited government and separated power should be declared a failure.

There is some reason to be optimistic. Recent cases suggest that there is still some life in our Founders' original concept of limited government. In *Jones v. United States,* 68 U.S.L.W. 4422 (2000), this Court unanimously rejected an Executive Branch attempt to expand Commerce Clause legislation to the greatest possible extent. The Department of Justice had argued that a private residence was a building that was "used in or affecting interstate commerce," because it was financed with an out-of-state mortgage, insured by an

out-of-state insurer, and heated by out-of-state natural gas. The defendant, Dewey Jones, was sentenced to 30 years under the federal arson statute instead of the 10 year maximum penalty for the same offense under Indiana law. The government admitted that there must be some kind of nexus between interstate commerce and the predicate act, but argued that the government neither had to prove that there was an "*actual effect*" on commerce nor a "substantial effect" in each case. Brief for United States at 13, *Jones, supra* (No. 99-5739) [*emphasis in original*]. Every member of this Court recognized and rejected this threat to individual rights.

The Department of Justice prosecuted Dewey Jones under the federal arson statute because, for almost half a century, there have been no meaningful limits to Congress's power under the Commerce Clause. That began to change when this Court declared the "substantial effects" test in *Lopez v. United States*, 514 U.S. 549 in 1995. And after this Court's decision in *United States v. Morrison*, *supra*, one could no longer safely assume that Congress can regulate *anything* under the guise of commerce. For the first time since 1942, this Court has begun to insist that the power to regulate interstate commerce is part of our overall system of *limited* and *enumerated* powers. This is a time of transition.

At a time of transition like this, we suggest a long, careful look at the very first important Commerce Clause case: *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824). It was an historic case in every sense of the word. The parties were fighting over a steamboat monopoly that was originally granted to Robert Fulton, the inventor of the steamboat. Daniel Webster argued the winning side. Chief Justice John Marshall wrote the majority opinion. *Gibbons* introduced a broad reading of the Commerce Clause that won the respect of the founding generation.

But *Gibbons* did not introduce an unlimited reading of the Commerce Clause. Chief Justice Marshall identified a *textual* limit on Congress's power and a *political* limit. Marshall took the text of the Constitution as he found it, rejecting both an "enlarged construction" and a "strict construction" of the words the Founders chose. He pointed to the political restraints built into the Constitution. The political accountability of the elected legislature is the only real restraint on some of the enumerated, yet plenary powers of Congress. This is a structural guarantee of liberty, and a vital part of our constitutional separation of powers.

Marshall's two restraints--the textual and the political--provide all the guidance this Court needs to resolve this case. Congress has enacted legislation intended to protect the navigable waters of the United States. A coordinate branch of government has construed "the navigable waters" so broadly as to include water-filled ditches on an abandoned strip mine in the Chicago suburbs, on the theory that migrating birds affect interstate commerce enough to create congressional power over these puddles. No Congressman has ever had to defend a vote for or against this startlingly broad reading of the Commerce Clause, however. It is the EPA that proclaimed the "migratory bird rule" that produced this result, and the Army Corps of Engineers that denies the permits on this basis.

We believe that John Marshall's emphasis on plain language and political accountability mandate a reversal of the decision below. The question here, as in last term's case of *FDA v. Brown & Williamson*, 68 U.S.L.W. 4194 (2000) is not what Congress *might* do to regulate commerce, but what the Executive Branch can do with a statute Congress has enacted for another purpose altogether. The question in *Brown & Williamson* was whether the FDA could unilaterally de-

fine tobacco as a "drug." The question in this case is whether the EPA can redefine water-filled ditches into "navigable waters." If we still believe in plain language and political accountability, the answer in this case has to be no. We therefore urge this Court to overturn the decision of the Seventh Circuit.

ARGUMENT:

BOTH THE TEXTUAL AND THE STRUCTURAL RESTRAINTS OF THE CONSTITUTION PROHIBIT THE EXECUTIVE BRANCH FROM EXPANDING THE STATUTORY TERM "NAVIGABLE WATERS" TO INCLUDE WATER-FILLED DITCHES ON AN ABANDONED STRIP MINE

A. *GIBBONS V. OGDEN* IS A SOUND FOUNDATION FOR A TWENTY-FIRST CENTURY UNDERSTANDING OF THE COMMERCE CLAUSE

In the twentieth century, America endured a World War and a Great Depression, a New Deal and another World War, a struggle for civil rights at home and a Cold War against communism. A century of struggle turned this nation into the world's lone superpower, but it led us far from our Founders' original vision of limited and enumerated federal powers. The question for the twenty-first century will be whether the federal government will continue its twentieth-century trend until it absorbs and consumes every lesser center of power, or whether America will rediscover the dual sovereignty our Founders originally envisioned.

This Court's 1999 term suggests that our Founders' vision may yet prevail. For the first time in decades, the Court placed real limits on Congress's power to expand the meaning of the Constitution and on the Executive's power to expand the meaning of statutes. *Morrison, supra*; *Brown & Williamson, supra*. There were those who were quick to criticize these rulings as "judicial activism." The Court can be active, however, without being activist. It is not activism

for this Court to exercise *its* constitutional powers when the coordinate branches of government go far beyond the boundaries of *theirs*.

If nothing ever changed, there would be no need for an active Court. But changing times require changing rules to protect unchanging values. For example, in the face of the totalitarian regimes of the 20th Century, America had to concentrate all its force into a single fist in defense of liberty.[2] But to defend liberty today, now that the threat has passed, we must exchange that fist of war for the open hand of peace.

In changing times like these, we do well to consider other times of transition. This *amicus* believes that the early twenty-first century is an ideal time to rediscover the wisdom

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[2] Justice Jackson touched on this concept in his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944). He wrote:

> When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

Korematsu, 323 U.S. at 244 (Jackson, J., *dissenting*).

of the early nineteenth century, and, in particular, the wisdom of Chief Justice John Marshall in *Gibbons v. Ogden*.

The times are more similar than one might think. In 1824, the world had just regained its breath after the terrifying years of the Napoleonic Wars, a struggle that rocked all of Europe and sucked America into the War of 1812. America was just beginning to see daylight after a long dark economic night that began with the crippling debts of the Revolutionary War. The next generation promised to be good for the still-young nation.

In the year 2000, the world has just regained its breath after a Cold War that affected the whole world. The threat of "mutually assured destruction" is fading away like a bad dream, and Americans wake up in the morning bent on the pursuit of happiness instead of the global struggle to preserve life and liberty. Our national debt is still in the trillions, but the ink in Washington is black instead of red, these days. For the first time since our nation was very young, we have the freedom to rediscover the untapped potential of America's unique system of dual sovereignty.

For we have yet to unleash the full promise of our constitutional system. Although this Court often speaks of the States as "laboratories of democracy," we have yet to achieve the possibilities of that phrase. The Tenth Amendment speaks to a system where self-governing individuals exercise individual liberties; self-governing States exercise wide-ranging sovereign powers; and a strong but limited federal government increases the security and prosperity of all without intruding upon the protected rights of any.

This Court has recently begun to move in that direction. Some critics have been quick to label these as "States' rights"

decisions, but that is a mistake. These recent decisions do not just limit the federal government in order to benefit the States. Instead, the Court has begun to revive the concept of self-government at every level: limiting federal power to promote self-governing States, and limiting State power to protect self-governing voluntary associations. *See, New York v. United States,* 505 U.S. 144 (1992) (federal government cannot co-opt State legislatures); *Printz v. United States*, 521 U.S. 898 (1997) (Congress cannot co-opt local law enforcement officials); *Boy Scouts of America v. Dale*, 68 U.S.L.W. 4625 (2000) (States cannot prohibit voluntary associations from choosing their own leaders); *California Democratic Party v. Jones*, 68 U.S.L.W. 4604 (2000) (States cannot force political parties to let members of other parties choose their candidates); *Troxel v. Granville*, 68 U.S.L.W. 4458 (2000) (States cannot force parents to allow visitation with any third party). These cases all reverse the 20th Century trend towards centralized power, replacing it with a new paradigm of self-government.

B. CHIEF JUSTICE JOHN MARSHALL BELIEVED IN SEPARATE, SOVEREIGN GOVERNMENTS WITH SEPARATE, PLENARY POWERS

That "new" paradigm, however, is hardly new. Our Founders believed in self-government. They assumed that households, churches, voluntary associations, towns, cities, counties, and States would all be able to govern themselves. They recognized, however, that there were some things that State and local governments could not handle on their own, and so they established a self-governing Union of thirteen States to do what the States were separately unable to accomplish. That federal Union was an experiment in government that has succeeded beyond their wildest expectations.

Chief Justice John Marshall had a bold, clear vision of how the new Constitution should work. Central to that vision was his concept of the relationship between the people, the States, and the new federal government. Marshall insisted that the new Union was not created by the States, and it did not merely exercise a subset of powers delegated by the States. Instead, the new government was created directly by the people themselves. This meant that the sovereign power was *separated*, not *delegated*.

This concept of separated sovereignty is crucial to understanding Marshall in *Gibbons*. The losing party in that case had urged the Court to apply a "strict construction" to the Constitution, arguing that the power to regulate commerce was an express delegation of power from the States, and that any express delegation of power should be strictly construed. *Gibbons*, 22 U.S. (9 Wheat) at 43. Chief Justice Marshall rejected the premise that the federal government was exercising powers delegated by the States. He identified a change that Justice Kennedy has since aptly called "splitting the atom of sovereignty," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1994) (Kennedy, J., *concurring*). Marshall wrote:

> When these allied sovereigns [the States] converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consid-

> eration of the instrument by which that change was effected.

Gibbons, 22 U.S. (9 Wheat) at 187.

Marshall did not view the federal government as the child of the State governments, depending for its existence on a meager allowance of power. But that did not mean he viewed the States as mere "departments" of an all-consuming federal government, either. In Marshall's view, the *people* were ultimately sovereign, and the Constitution was the instrument by which a sovereign people divided power between State and federal governments, and between the various branches of the new federal government.

C. CHIEF JUSTICE MARSHALL REJECTED BOTH A "STRICT CONSTRUCTION" AND AN "ENLARGED CONSTRUCTION" OF THE CONSTITUTIONAL TEXT

Marshall believed that all power resided ultimately with the people, but that power was dormant until delegated. Marshall saw no reason for leaving power untapped:

> The grant [to Congress] does not convey power which might be beneficial to the grantor [the people], if retained by himself, or which can inure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.

Gibbons, 22 U.S. (9 Wheat) at 189.

Because of this view, Marshall roundly rejected arguments for a "strict construction" of the Constitution. He did not do this in a way that would trouble modern "strict constructionists," however. In fact, Marshall's rejection of a "strict construction" is a powerful argument in favor of this *amicus'* understanding of what is now known as "strict constructionism." Marshall said:

> What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle.

Gibbons, 22 U.S. (9 Wheat) at 188.

This *amicus* does contend against any "enlarged construction, which would extend words beyond their natural and obvious import." "Interstate commerce" does not naturally and obviously include the flight of migratory birds. "Navigable waters" do not naturally and obviously include water-filled ditches on an abandoned strip mine. Chief Justice John Marshall might question whether this should properly be called "strict construction," but he would not controvert the principle.

Rejecting such an "enlarged construction" does not deprive Congress of the power to do what America needs. Marshall would not "cripple the government, [and] render it unequal to the object, for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent." *Gibbons*, 22 U.S. (9 Wheat) at 188. The objects of the Constitution are eloquently set forth in the Preamble of that document, and include both the promotion of

the General Welfare and the preservation of the Blessings of Liberty. Congress can and should pursue both of these objects.

Marshall's concept of legislative power is consistent with the original draft resolution that the Framers adopted at the very beginning of the Constitutional Convention. At an early stage of the Convention, the delegates adopted a definition of the "the legislative power of the United States" that included the power to legislate on every subject for which the States were "severally incompetent."[3] 1 Madison, James, Journal of the Federal Convention 362 (2d ed. 1893) [hereinafter, "Madison's Journal"]. That broad definition was subsequently refined to the enumerated list of powers now found in Article I, section 8. Marshall's robust interpretation of the enumerated powers was completely consistent with the original concept of "separate incompetence."

The Clean Water Act is a good example of legislation for which the States would have been separately incompetent. Water pollution is no respecter of State boundaries. Agricultural pesticides that drain into the headwaters of the Mississippi flow past every State on that river from Minnesota to Louisiana; sludge from the mines at the western end of Lake Superior runs through all five of the Great Lakes before reaching the Saint Lawrence Seaway; and a pig farm in the Virginia tidewater can affect algae across the Chesapeake Bay in Maryland. The States cannot reliably solve such problems one by one. But, under a separate incompetence standard, the United States *can*.

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[3] This *amicus* has previously addressed the history and implications of the "separate incompetence" standard, with a particular emphasis on *Gibbons*, in our brief in *Jones, supra,* (No. 99-5739), pp. 5-16.

The Court has begun to note the difference between problems that are truly national and those that are merely nationwide. Truly national problems need a truly national solution, but there are nationwide problems that are truly local, which can be just as easily addressed by a range of differing solutions at the State or local level. We believe that the protection of non-migratory species may well fall into this latter category, but the protection of migratory species necessarily falls into the former.

The fact that migrating wildlife is a matter of truly national concern does not mean that Congress can protect migratory birds by just calling them "commerce," however. The Commerce Clause has had a long and twisted history. For a while, "commerce" seemed to include very little. *See Kidd v. Pearson*, 128 U.S. 1 (1888) ("manufacturing" is not "commerce"); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (prohibiting interstate shipment of goods produced by child labor is a regulation of production, not of commerce). Later, it seemed to include almost anything. *See Wickard v. Filburn*, 317 U.S. 111 (1942) (wheat grown on one's own land and fed to one's own chickens can be regulated as "interstate commerce"). On the whole, however, Commerce Clause jurisprudence has not progressed much beyond Marshall's early formulation. Congress currently seems to exercise plenary power over economic activity that affects more States than one, subject only to the political checks of the ballot box.

This Court's recent cases fit with Marshall's broad but not unlimited theory of the Commerce Clause. A plenary power over commerce does not give Congress power over things that are not commerce, like rape, *Morrison*, *supra*, or the mere presence of firearms near a school, *Lopez*, *supra*. Congress might therefore rely upon something other than the

power to "regulate ... commerce among the several States" to protect migratory birds.[4]

D. THE ELECTED LEGISLATURE SHOULD EXPRESS THE WILL OF THE PEOPLE, AND THE EXECUTIVE BRANCH SHOULD CARRY IT OUT.

Marshall believed in a limited but strong government. "[T]he sovereignty of Congress, though limited to specific objects, is plenary as to those objects." *Gibbons*, 22 U.S. (9 Wheat) at 197. When it came to the power over commerce among the several States, Marshall relied primarily upon the nature of representative government to determine those limits:

> The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints

[4] Free market conservationists argue that a system of economic incentives can accomplish the goal of protecting wildlife far better than any system of regulatory control. Under the current system, property owners are subject to severe loss whenever migratory birds may be attracted to water on their land. The prudent property owner should therefore take steps to make sure his or property cannot benefit birds. But this is madness! In a system of well-designed economic incentives, the prudent property owner would look for the optimal fit between human use and bird use , resulting in a greatly expanded range of habitats for migratory birds. Only Congress can authorize the tax credits or appropriations that would be necessary to unleash the power of the free market, however. Upholding the EPA's power in this case takes away Congress's incentive to create such economic incentives.

> on which the people must often rely solely, in all representative governments.

Gibbons, 22 U.S (9 Wheat) at 197.

Many commentators have noted that our government combines the best features of democracy (in Congress), monarchy (in the Presidency), and aristocracy (in this Court). Our Founders concentrated the executive power of the United States in a single head because the Executive Branch only *carries out* the will of the people, as that will has been expressed by Congress. It is Congress, and only Congress, that can exercise the legislative powers vested by the Constitution. U.S. Const. Art. I, § 1. If the executive power of the United States includes a power to rewrite the laws, however, the monarchical branch can oppose the will of the people instead of carrying it out. Thus the executive might be transformed from a monarchical servant of the people into a legislative tyrant of the people.

Political accountability is one of our structural guarantees of freedom. If Congress can protect the "waters of the United States" and leave it up to the EPA to define those "waters" under the broadest possible interpretation of the Commerce Clause, then Congress could just as easily lay claim to the "money of the United States" and leave it up the IRS to decide what that is under the broadest possible interpretation of the Sixteenth Amendment. And since that Amendment allows Congress to "lay and collect taxes on incomes, from whatever source derived," that broadest possible interpretation would allow the IRS to claim every penny any American ever earned. We dare not leave the scope of congressional power to be determined by the Executive Branch.

Marshall's concept of political checks on the plenary commerce power took on new life in two recent decisions. In *Brown & Williamson*, *supra*, five members of this Court refused to defer to an Executive Branch rule that expanded the term "drug" to include tobacco. And in *Jones*, *supra*, every member of the Court agreed that the Justice Department was wrong to construe the term "in or affecting interstate commerce" so broadly as to convict a man for throwing a Molotov cocktail into his cousin's living room.

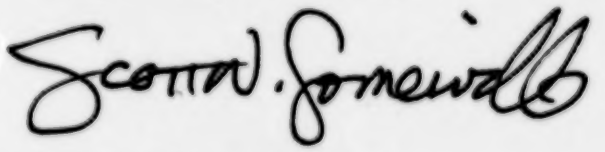
This last precedent, all by itself, should be sufficient to determine the outcome of this case. This Court unanimously overturned the conviction of Dewey Jones, even though the Executive Branch construed a Commerce Clause statute so broadly that almost every building in America "affected interstate commerce." Now, the Executive Branch is trying to convert almost any puddle in America into "navigable waters." Some people may value the liberty of a petty arsonist more than the property of a consortium of Chicago suburbs. Nevertheless, the constitutional principles of limited government, separation of powers, and individual rights are the same, whether what is at stake in the case is 20 extra years in jail or the right to develop a landfill. This Court did the right thing when it ruled against the Department of Justice in favor of a convicted arsonist like Dewey Jones. The right thing now is to rule against the Army Corps of Engineers and set 23 municipalities free to convert an abandoned strip mine into a landfill.

CONCLUSION

John Marshall believed in plain language and political accountability. Those two principles are all that are needed to determine the outcome of this case. There are a number of ways that Congress can protect the habitat of migratory

birds, but all of them require elected legislators to justify their actions to the voters. There is no such accountability when unelected Executive Branch officials stretch the term "navigable waters" to include the water-filled ditches on an abandoned strip mine. The EPA, just like the FDA in *Brown & Williamson, supra*, has twisted the plain language of statutes to mean something altogether other than what Congress originally intended. This is an unconstitutional exercise of the legislative power of the United States, which this Court should reject. We therefore urge this Court to overturn the decision below.

Respectfully Submitted,



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